APPEAL NO. 92232

A contested case hearing was held on May 11, 1992, at (city), Texas, (hearing officer) presiding as hearing officer. She determined that the respondent had disability in that she is unable to obtain or retain employment at wages equivalent to her preinjury wage because of a compensable injury. The hearing officer ordered benefits in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., arts. 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). Urging that the overwhelming weight of the evidence is against the conclusion and decision of the hearing officer, the appellant asks that we reverse and render or, in the alternative, reverse and remand.

DECISION

Finding the evidence sufficient to support the findings, conclusions and decision of the hearing officer, we affirm.

The single issue in dispute in this case is whether the respondent is entitled to further temporary income benefits (TIBS) or whether disability has ended. Workers' compensation coverage through the appellant as well as the fact of a compensable injury to the shoulders and neck having been sustained on (date of injury) were stipulated to by the parties.

The respondent was employed as a bank branch manager and had worked for the employer's predecessor for 12 years before that bank was "taken over" by employer bank. During this "take over" time period including the time in which she was injured on (date of injury), the bank was undergoing a number of changes. Among other things, the staff at her branch was substantially cut and the respondent was retained in a probationary status which was apparently a standard procedure in reorganizations of this nature. According to the testimony of the respondent, her duties included lifting heavy objects such as safety deposit boxes, equipment parts, boxes of documents and forms, refuse containers, and involved considerable bending and stooping. She stated that she was in considerable pain doing these functions because of her injury. She also stated there was considerable stress on the job once the "take over" occurred. She ultimately resigned her position on October 4, 1991 because, according to her testimony, it was too strenuous. She had been off work following her injury for a short time and returned with a medical restriction on heavy lifting. She stated that the drastic staff cut precluded her from assigning all the strenuous duties to others. She obtained another less demanding position at a reduced salary at another bank (she indicated she had been inquiring about other job prospects once the "take over" of the bank became apparent) but was unable to continue to work. Her doctor determined that she was unable to work on November 1, 1991, and she has not been employed since. Her doctor has recommended surgery for her two herniated discs at C3-4 and C6-7. The respondent stated that she suffered severe headaches, shoulder and neck pain, and blurred vision and that she became unable to perform either of the jobs. She indicated she still has these symptoms.

The testimony of an employee occupying a position similar to the respondent's

testified about the duty requirements. This testimony was largely cumulative to that of the respondent. A senior vice-president of the "take over" bank testified that he was the respondent's supervisor (although not at the same location) and that she had never complained to him that the physical requirements of the job were too difficult for her to perform, nor did she mention that she was experiencing physical problems, pain or suffering. He stated the respondent never mentioned anything when she voluntarily resigned in October, 1991. He stated the respondent had been on probationary status for 90 days and that this status had been continued. His testimony was not in full agreement with that of the respondent regarding heavy duty requirements of the job. Medical records considered at the hearing support the fact of an injury, a initial release to light duty, and the treating doctor's subsequent determination that the respondent was not able to work. A report of a carrier selected doctor, Dr. Q., who saw the respondent on February 25, 1992, reflects his diagnosis of: (1) strain of cervical spine, and (2) herniated nucleus pulposus C3-C4, C6-C7; and his feeling that she can return to work as a banker, that she will have some permanent disability and that she has not reached maximum medical improvement.

The hearing officer's findings of fact included the following:

4.The Claimant was released to return to light duty work after her injury by her treating doctor, (Dr. SEG) but was unable to perform the light duty work due to the complications caused by the injury to her neck and shoulders.

5.The Claimant accepted other, similar employment requiring less physical exertion in October, 1991, at a lower salary; on November 1, 1991, the Claimant's treating doctor determined that she was unable to work.

6.The Claimant has not worked since November 1991, due to her injury; and no doctor has certified that she has reached maximum medical improvement.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). As the trier of fact, the hearing officer may believe all, part or none of the testimony of witnesses; judge credibility; assign weight; and resolve conflicts and inconsistencies. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied); Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e). Although a claimant is an interested witness, his or her testimony does no more that raise a fact issue for the finder of fact and the finder of fact may well chose to believe it (Highlands Insurance Co. v. Baugh, 605 S.W. 314 (Tex. Civ. App.-Eastland 1980, no writ)) even to the exclusion of other evidence including that of experts. Texas Employers Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston 1981, no writ). Only if we were to determine, which we do not, that the findings of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we set aside or otherwise disturb her findings and determinations. Pool v.

Ford Motor Co. 715 S.W.2d 629 (Tex. 1986); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.)

In our decision in Texas Workers' Compensation Appeal No. 91045 (Docket No. redacted) decided November 21, 1991, we discussed the concerns associated with a determination of the end of disability. While there is, no doubt, some conflict in the evidence in the case under consideration, we find there is sufficient evidence from which the hearing officer could find that disability has not ended under the particular circumstances present. The hearing officer did not, therefore, err in affirming the interlocutory order to pay income benefits. Accordingly, the decision is affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge